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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARDOS GRAY, JR.,

Defendant and Appellant.

B158437

(Los Angeles County
Super. Ct. No. TA061703)

APPEAL from the judgment of the Superior Court of Los Angeles County. Allen J. Webster, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Thien Houng Tran, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Bernardos Gray, Jr., appeals from a judgment entered upon his conviction after a court trial of second degree robbery (Pen. Code, § 211)¹ and assault with a deadly weapon by means likely to produce great bodily injury (§ 245, subd. (a)(1)). The trial court also found that appellant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)), as to both counts, and, that he personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), as to the robbery count, to be true. Appellant admitted the allegation that he suffered a prior felony conviction within the meaning of sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i) and 667, subdivision (a). The trial court sentenced him to 14 years in state prison. Appellant contends that the trial court denied him due process and his right to confront witnesses by erroneously allowing the prosecutor to cross-examine him about a similar crime allegedly committed by him without determining if there was admissible evidence to prove it.

We affirm.

FACTS

The Prosecution Case.

On September 4, 2001, at approximately 8:30 p.m., Carlos Garnica was on Long Beach Boulevard, in the City of Lynwood, putting water into his overheated car. Appellant, another man and a woman approached him and demanded money. When Garnica refused, appellant grabbed him by the neck and went through his pockets. The other man demanded Garnica's car keys and punched him in the face. Frightened, Garnica got into his car, and, as he did, appellant threw a brick, hitting him in the shoulder. Garnica began to drive away, but after driving only a few yards, appellant jumped through the passenger window and began hitting him. One of the assailants opened the car door and pulled Garnica out by his shirt and hair, and he fell on his back in the street. When he was on the ground, appellant hit him in the head with a mallet taken from Garnica's car, causing him to go in and out of consciousness. Appellant took Garnica's wallet and cell phone. Garnica yelled for

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

assistance, and when he was able to escape, ran across the street to seek help. When the police arrived, he ran towards one of the deputies.

Garnica was taken to the hospital with multiple injuries, including an injury to his eye and nose that continued to cause him breathing problems at the time of trial. Garnica denied having ever seen his assailants before the incident and denied going to a motel with the female to have sex.

The Defense Case.

Appellant testified that he dated Samantha Starks who was a prostitute. When she was working, he would “watch out for her.” They communicated by walkie talkie. On September 4, 2001, Garnica had a “date” with Starks at a motel on Long Beach Boulevard. Starks called appellant and said that Garnica was “trippin’” as he was trying to “get a date for \$9.” Appellant saw Garnica attempting to hold Starks and Starks trying to pull away. Appellant grabbed Garnica, and they began fighting in the motel parking lot. Garnica fell to the ground. The fight stopped when people at the hotel told them to leave.

Appellant and Starks walked to a nearby restaurant parking lot. Garnica drove his car into the parking lot, ran over Starks and tried to leave. Appellant saw Starks “laid out on her face” and did not know if she was dead or alive. He ran to Garnica’s car, jumped through his passenger side window as Garnica tried to drive away, and with his legs dangling outside the window, appellant started punching Garnica in the face and grabbing his neck. Appellant testified that Garnica hit him in the neck with a mallet.

Garnica stopped his vehicle, and he and appellant continued to fight. People started gathering, and appellant told them Garnica had run over his girlfriend. Someone opened the passenger door and dragged Garnica out of the vehicle. Garnica and appellant continued fighting. Garnica had the mallet, but appellant was unarmed. Appellant tried to hold Garnica for the police, but he became tired. He recovered Garnica’s wallet and cell phone, which had fallen out of Garnica’s pocket during the fight, in order to obtain his identification for the police.

When the police arrived, appellant remained at the scene and told one of the deputies that Garnica had run over his girlfriend. Starks was transported to the hospital with an

injury to her ankle and “a lot of scratches and bruises.” Appellant later told the police that the wallet and cell phone belonged to Garnica and that he grabbed them to make sure he had Garnica’s identification. He lied to the deputies, telling them Starks was not prostituting.

Brenda Serrano, an employee of the restaurant in whose parking lot Starks was allegedly run over, saw appellant and Starks in the parking lot when a vehicle entered. She saw Starks fall to the ground but did not see her being hit by a car.

A tape recording of a 911 telephone call made by Marisol Hernandez was introduced in evidence by stipulation of the parties. It indicated that at the time of the incident, Hernandez telephoned 911 and reported seeing a car run over a woman. She also reported that a man was hanging onto the car’s window as it was driving away and that two Black men were beating a Mexican man.

DISCUSSION

During trial, the following transpired during cross-examination of appellant:

“Q. Was there another situation between -- or involving you and Samantha where you also took -- [¶] [Defense Counsel]: Your Honor, I’ll object to any other situation. [¶] The Court: Well, what’s your offer of proof? [¶] [Prosecutor]: My offer of proof is there was another incident that involved the defendant and Samantha where yet another person’s car was taken and they claimed in that situation that it was a John whose car was -- [¶] The Court: Was he convicted of that? [¶] . . . [¶] [Prosecutor]: There was no conviction, but prior bad act -- that goes to show intent in this case in absence of self defense under 1101(b). [¶] The Court: I need more information about that. This is the first time I’m hearing about this. [¶] Do you know anything about this? [¶] [Defense Counsel]: I know about it, but there was no foundation laid for the 1101(b). [¶] . . . [¶] [Defense Counsel]: It wasn’t going to be introduced, as far as I was concerned. [¶] The Court: I think that’s what he’s doing now at this point, but you wouldn’t be the one to do it. I think that’s -- [¶] [Prosecutor]: Right. I don’t know what more foundation I would need. It’s conduct that he engaged in with the same person. [¶] The Court: Okay. When did this allegedly happen? [¶] [Prosecutor]: 8/21/01, which would have been -- [¶] The Court: About ten days

before this thing happened on the 4th of September. [¶] [Prosecutor]: Approximately, yes, ten days. Two weeks. [¶] The Court: Overruled.”

When questioning resumed, the prosecutor asked: “Was there also a situation on August 21, 2001, where you also took a car from someone?” Appellant answered “No.” The prosecutor introduced no additional evidence pertaining to this prior incident.

In rendering its decision, the trial court indicated that there were two factual scenarios in evidence. Garnica’s version of events that he was putting water in his overheated car when he was attacked by three assailants and appellant’s version that Garnica was a customer in a prostitution transaction gone awry. The court stated, that “either theory that the court advances, I think the real crux of the case is did what happened afterwards really justify what occurred to Mr. Garnica? There was a lot of discrepancies in this case on both sides, I thought Mr. Garnica, for the most part, was a credible witness. And although I had some problems with [appellant’s] testimony and he was impeached, there was some moniker of truth to some of what he said.”

The trial court elaborated on the conflicts and discrepancies, most of which weighed against appellant. It noted, among other things, the inconsistency between appellant’s testimony that he and Starks communicated by walkie talkie and the police officer’s testimony that he had never seen walkie talkies used by a prostitute, the inconsistency in appellant’s testimony that he was Starks’s protector yet there were two men beating Garnica, the lack of clear evidence of how Starks got to the ambulance, the discrepancy that appellant was apparently not injured despite fighting with Garnica who appellant claimed hit him with a mallet, appellant’s lie that Starks was not a prostitute and the uncertainty of how he came into possession of Garnica’s wallet and cell phone.

The court also noted: “Then we had the prior incident that occurred on August 24th involving [appellant] and [Starks], allegedly something similar to what occurred ten days later out there on Long Beach Boulevard. . . . [¶] . . . So it seems to the court, even if [appellant] -- giving him the greatest credibility as possible -- was the protector of [Starks] and he was there to basically seek some sort of retribution for the fact that this man allegedly sideswiped her or struck her with the car, it just seems to me that at that point,

rather than being her defender, he became the aggressor resulting in serious injury to Mr. Garnica who, at best, had to go to the hospital as a result of this. [¶] . . . [¶] . . . [B]ottom line is, one, he was assaulted so seriously he was hospitalized. And, two, that he was robbed.” The trial court found appellant guilty of second degree robbery and assault with a deadly weapon by means likely to produce great bodily injury but not guilty of attempted carjacking (§§ 664, 215, subd. (a)).

Appellant contends that allowing the prosecution to ask him about the prior incident, without introducing evidence to establish that it occurred after appellant denied it, was reversible error on several grounds.

First, appellant argues that it constituted prosecutorial misconduct. We note that appellant never objected in the trial court on the ground of prosecutorial misconduct, thereby waiving that claim. Generally, ““a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.”” [Citation.]” (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

If the issue had been properly preserved for appeal, we would find no misconduct here. “It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact *or* is prepared to prove the fact by other means.” (*People v. Price* (1991) 1 Cal.4th 324, 481, italics added.) If the prosecutor has reasonable grounds to anticipate an answer confirming the fact, it is not necessary to prove it. The essence of the test is good faith. The prosecutor cannot ask a question suggesting a negative fact knowing it is untrue or having no belief that it is true, thereby leaving with the trier of fact a negative suggestion about the appellant that has no basis.

Here, defense counsel admitted that he had heard about the prior incident involving appellant and Starks. He did not challenge the prosecutor’s characterization of the facts in the offer of proof. Consequently, the record reflects the prosecutor had reason to believe

that he would obtain an affirmative response from appellant when he asked him about an incident that his attorney acknowledged.

Appellant also contends that because the trial court considered the allegation of the prior crime in determining his guilt, he was denied his right to confront and cross-examine witnesses against him under the federal Constitution, Sixth and Fourteenth Amendments and article 1, section 15 of the California Constitution.²

It is clear that there was no evidence before the court that appellant had been involved in taking a vehicle approximately 10 days before the charged offense, as appellant denied it in response to the only question asked on that subject. The prosecutor's question did not constitute evidence. (See *People v. Stuart* (1959) 168 Cal.App.2d 57, 60-61 [approving instruction to jury that statements of counsel are not evidence].) The trial court therefore incorrectly assumed it had evidence that appellant was involved in the prior incident. However, this error was harmless even under the most stringent beyond a reasonable doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 23-24.) In context, it is clear that the trial court's brief, single reference to the August 24 incident was an insignificant part of the rationale for its decision. The court's lengthy discussion of reasons for its ruling pointed primarily to inconsistencies and unanswered questions with respect to defendant's testimony. Moreover, the trial court concluded that even if it gave full credence to appellant's version that he was simply protecting his girlfriend, his conduct in beating appellant went beyond what was necessary, and he ended up with Garnica's property. This rationale was unaffected by the improperly considered testimony.

² We reject respondent's contention that appellant waived this constitutional argument by failing to raise it below. The cases it cites all involved waivers of constitutional claims premised upon the improper admission of evidence. Here, the constitutional claim pertains to the trial court's improper consideration of matters not in evidence, raising the specter that appellant may have been convicted on matters not in evidence before the court. We therefore find this error sufficiently important to justify exercising our discretion to consider it. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 ["[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"].)

Finally, appellant contends that because the prosecutor never produced evidence to prove the alleged prior crime, it is unknown whether it would have been admissible. Evidence of uncharged crimes is admissible to prove identity, common design or plan or intent if the uncharged crime is sufficiently similar to support an inference of those issues. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) The prosecutor made an offer of proof that indicated that the appellant with the same accomplice, Starks, just weeks before the charged crime took a vehicle from someone claimed to be one of her customers. This was an adequate showing of the relevance of the prior incident to allow the prosecutor to ask appellant if it occurred.³

DISPOSITION

The judgment is affirmed.

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_____, J.
DOI TODD

We concur:

_____, Acting P.J.
NOTT

_____, J.
ASHMANN-GERST

³ Given our conclusions, it is unnecessary for us to consider appellant's contention that if his claims were waived, he received ineffective assistance of counsel.